

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
SUPPLEMENTAL  
BRIEF**



74-1414

B p/s

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- -x

UNITED STATES OF AMERICA,

:

Appellee, :

- against -

:

Docket No. 74-1414

SPENCER THOMAS CHIN,

:

Appellant. :

----- -x



SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

DONALD J. FARINACCI, ESQ.  
Attorney for Appellant  
95 Front Street  
Hempstead, New York 11550  
(516) 481-6780

## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
QUESTION PRESENTED	1
STATEMENT OF FACTS	2
ARGUMENT	
<u>POINT ONE</u>	
THE FAILURE OF TRIAL COUNSEL TO CROSS- EXAMINE AS TO THE CIRCUMSTANCES OF DEFENDANT'S CONFESSION DEPRIVED DEFEND- ANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND VITIATED HIS SUBSEQUENT PLEA OF GUILTY	3
CONCLUSION	8

## CASES CITED

<u>Hamilton v. Alabama</u> . . . . .	3
<u>Powell v. Alabama</u> . . . . .	4
<u>Miranda v. Arizona</u> . . . . .	6
<u>United States v. Schipani</u> . . . . .	6
<u>Johnston v. Zerbst</u> . . . . .	7
<u>Davis v. United States</u> . . . . .	7
<u>Com. of Pa. ex rel. Herman v. Claudy</u> . . . . .	7
<u>Chambers v. Florida</u> . . . . .	7



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - -x  
UNITED STATES OF AMERICA, :  
Appellee, :  
- against - : Docket No. 74-1414  
SPENCER THOMAS CHIN, :  
Appellant. :  
- - - - -x

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Mishler, J.) entered on March 29, 1974, convicting appellant, after plea of guilty, of one count of bank robbery, in violation of 18 U.S.C. Section 2113(a), and sentencing him to a term of 15 years in prison. The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal and filed its brief and appendix.

By subsequent order of this court, the Legal Aid Society was relieved as counsel and on June 24, 1974, Donald J. Farinacci was assigned as counsel on appeal.

Appellant is presently incarcerated under the judgment of conviction.

QUESTION PRESENTED

Whether the failure of trial counsel to cross-examine as to the circumstances of defendant's confession deprived defendant of his Sixth Amendment right to effective assistance of counsel and vitiated his subsequent plea of guilty.

## STATEMENT OF FACTS

The following are those facts relevant to the issue raised by this supplemental brief.

### MIRANDA HEARING

January 15, 1974

FRANCIS JAMES DOYLE, testified as follows for the prosecution:

He is a special agent of the Federal Bureau of Investigation (9).\* On August 15, 1973, he took the defendant into custody at the 79<sup>th</sup> Precinct of the New York City Police Department (9). At this time, he advised the defendant of his rights by reading to him from a card and after said rights were read to him, the defendant advised the witness that he fully understood his rights (10). The defendant was then transported to the Bureau offices at East 69<sup>th</sup> Street in New York City, where his rights were again read to him from an "Interrogation Advice of Rights" Form by another agent (12). The form was then presented to the defendant who read it aloud himself (13). Upon completion, the defendant was asked did he understand his rights and did he understand what the form meant and what was on the bottom (13). The defendant said yes, he was familiar with his rights, understood them fully and he signed the bottom of the form containing the portion entitled "Waiver of Rights" (13). The defendant then discussed what had happened that day (13).

[After a brief cross-examination by defense counsel, the Court stated at page 16:

"Suppose you resume, Mr. Doyle, and testify to the circumstances under which the statement was

\* Numbers in parenthesis refer to pages in the record below



given. All you did was testify as to Miranda rights and that he understood them. Let's go further. Would you please resume."

Whereupon, Agent Doyle took the stand again for re-direct testimony and the court immediately stated as follows at page 17:

"Say, "Is this what he said?" to short-cut it, and then give it to Miss Seltzer Defense Counsel 17. I'm talking about the circumstances, who was present and whether it was Q & A or whether it was just a narration; whether this is the language of the agent or whether this was his language, matters like that." 17

Whereupon Agent Doyle testified as follows on re-direct:

The interview with the Defendant was conducted by himself and Agent MICHAEL J. HENEHAN (17). It started as a question and answer interview but the most comprehensive account came in a brief narration by the defendant concerning the bank robbery (18). The statement given by the defendant was in part the defendant's exact words but totally it was the way the agents wrote it down, also (18). The interview lasted approximately an hour or an hour and a half (18). The defendant was very responsive (19). It was the witness' "substantive opinion" that the defendant seemed to be "an above-average human being and fairly intelligent"(19).

#### ARGUMENT

#### POINT ONE

THE FAILURE OF TRIAL COUNSEL TO CROSS-EXAMINE AS TO THE CIRCUMSTANCES OF DEFENDANT'S CONFESSION DEPRIVED DEFENDANT OF HIS SIX AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND VITIATED HIS SUBSEQUENT PLEA OF GUILTY.

Under the Sixth Amendment to the Federal Constitution an accused is entitled to effective assistance of counsel at all critical stages of the criminal proceedings. Hamilton v. Alabama,

368 U.S. 52 (1961). A defendant is entitled to effective assistance such that his rights are safeguarded and his defense competently and zealously presented. Powell v. Alabama, 287 U.S. 45 (1932).

In the instant case the defendant entered a guilty plea to bank robbery only after first going through a Miranda Hearing (9-20) and hearing the prosecution's case in chief portion of the trial. The defendant had allegedly given Federal agents a complete statement of his participation in the crime with which he was charged, according to Agent JAMES DOYLE'S testimony at the Miranda Hearing. It was obvious, however, after defense counsel's brief cross-examination of Agent DOYLE, that the Court was not satisfied that the circumstances under which the statement was given had been sufficiently stated for the record, so as to sustain a finding of voluntariness beyond a reasonable doubt. This is evidenced by the Court's statement to the witness at page 16 of the record as follows:

"Suppose you resume, Mr. Doyle, and testify to the circumstances under which the statement was given. All you did was testify as to Miranda rights and that he understood them. Let's go further. Would you please resume."

Upon Agent DOYLE'S resuming the witness stand, the Court elaborated upon the above statement as follows:

"THE COURT: Say 'Is this what he said?' to short-cut it, and then give it to Miss Seltzer. I'm talking about the circumstances, who was present and whether it was Q & A or whether it was just a narration; whether this is the language of the agent or whether this was his language, matters like that." (17)

It is clear that the re-direct testimony of Agent DOYLE which ensued raised many questions concerning said circumstances which trial counsel should have explored on cross-examination.



The agent testified that his interview with defendant started out as question and answer and ended up as a brief narration by defendant (18). The following are some of the questions raised by this statement: To what extent did the interview consist of questions and answers and to what extent narration? What were some of the specific questions asked defendant and what were defendant's specific responses? How brief actually was defendant's narration and what was its content?

Agent DOYLE further testified that the interview was conducted by himself and Agent HENEHAN (17). Questions were raised as follows as to under what circumstances the interview was conducted: What was the size of the room? Was the door open or closed? Was the defendant seated or standing? Were the agents seated or standing? Did anyone else enter the room during the course of the interview? Were any threats or promises made to the defendant?

With respect to the defendant's statement itself, containing his confession, Agent DOYLE stated that the statement was in part defendant's exact words but "totally it would have to be the way we wrote it down, also." (18) This statement was ambiguous and confusing and raised a question as to how much of the content of the statement was actually knowingly narrated by defendant and how much consisted of the agents' words indorsed by defendant's signature beneath.

In reply to the Court's question, Agent DOYLE further testified that the defendant was "very responsive" (19). Questions immediately arose as to what the underlying facts were which caused the agent to make this conclusory statement.

Finally, Agent DOYLE gratuitously offered his assessment of the defendant, as appears on page 19 as follows:

" . . . He seemed to me at the particular time, which is a substantive opinion, an above-average

human being and fairly intelligent."

This gratuitous opinion of the witness should have been objected to by defense counsel and stricken from the record. But, since it was not, at the very minimum it raised questions that should have been delved into on cross-examination. For example, one wonders what Agent DOYLE based his opinion of defendant's intelligence upon. What did he mean by "an above-average human being"? What questions were asked of the defendant to ascertain that he understood his rights and knowingly waived them? What were defendant's specific answers to said questions or other statements by defendant which indicated that he understood his rights?

Yet, despite all of the foregoing unanswered questions and many others raised by Agent DOYLE'S re-direct testimony, defense counsel did not have a single question to ask the witness on cross-examination.

The aforesaid omission on counsel's part was not a trivial one. The government carried a heavy burden of proving that at the time defendant gave his confession, he knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda v. Arizona, 384 U.S. 436 at 475 (1966). And, despite the enactment of 18 U.S.C. 3501 setting forth criteria for the admissibility of confessions, the government still has the burden of proving beyond a reasonable doubt that a confession was not obtained by violation of defendant's vital constitutional or statutory rights. U.S. v. Schipani, 289 F. Supp. 43 (D.C.N.Y., 1968). The court below was sensitive to the requirements for finding a confession voluntary beyond a reasonable doubt and demonstrated its concern by expressing dissatisfaction with Agent DOYLE'S testimony and ordering him brought back to testify as to the circumstances under which defend-



ant's statement was obtained. Apparently, trial counsel did not share this concern for she had no questions to ask of Agent DOYLE. The Supreme Court of the United States has always set high standards for the waiver of constitutional rights. Johnston v. Zerbst, 304 U.S. 458 (1938). Where, as in the instant case, the waiver must be proved by the prosecution beyond a reasonable doubt, it would appear to be the duty of counsel to do everything in its power to put the prosecution to the test. The record does not demonstrate that during the Miranda hearing of the proceedings below, defense counsel rendered that degree of effective assistance necessary to ensure that defendant's rights were safeguarded and his defense competently and zealously presented. See Powell v. Alabama, supra. As a result, it appears that defendant was deprived of the effective assistance of counsel at a highly critical stage of the proceedings.

Moreover, it cannot be seriously argued that this denial of a constitutional right was waived by defendant's subsequent plea of guilty. One accused of a crime has the right to the assistance of counsel before entering a guilty plea. Davis v. U.S. 376 F. 2d 535 (C.A. Tex., 1967). This decision must be read in the light of Hamilton v. Alabama, supra., which requires effective assistance of counsel at all critical stages of the proceedings. There is strong dicta in Com. of Pa. ex rel. Herman v. Claudy, 350 U.S. 116 (1956), that a conviction based on a plea of guilty will be invalid where underlying said plea was a violation of defendant's constitutional rights. (See also, Chambers v. Florida, 309 U.S. 227). Furthermore, the record below supports an inference that the plea of guilty could have been partially induced by the lack of effective assistance of counsel mentioned herein. It would be a miscarriage of justice to hold that a plea of guilty waives a prior constitutional defect in the proceedings, especially where the defect itself may have par-

tially induced the said guilty plea. It would be more consistent with essential elements of fairness to hold that a deprivation of effective assistance of counsel at a critical stage of the proceedings vitiates a subsequently entered plea of guilty.

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT  
OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

DONALD J. FARINACCI, ESQ.  
Attorney for Appellant  
95 Front Street  
Hempstead, New York 11550  
(516) 481-6780



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - -x

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

SPENCER THOMAS CHIN, :

Appellant. :

- - - - -x

Docket No. 74-1414

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

DONALD J. FARINACCI, ESQ.  
Attorney for Appellant  
95 Front Street  
Hempstead, New York 11550  
(516) 481-6780

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - -x

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

Docket No. 74-1414

SPENCER THOMAS CHIN, :

Appellant. :

- - - - -x

INDEX TO APPENDIX

APPENDIX

DOCKET ENTRIES

A

INDICTMENT

B



MISALER, J.

## APPENDIX A

[illegible][illegible]

DATE	PROCEEDINGS
8/23/73	Before DOOLING, J.- Indictment filed
8/31/73	Before DOOLING, J.- Cse called- Deft and counsel-Marion Seltzer pres as counsel-Deft arraigned and enters a plea of not guilty-Deft moves for a reduction of bail-Motion denied.
9/6/73	Govt's notice of readiness for trial filed
9/19/73	Magistrate's file 73M1254 inserted into Criminal file 73CR779
11-19-73	Before MISHLER, CH J - Case called - trial adjd to Nov. 27, 1973 on consent.
11-27-73	Before MISHLER, CH J - Case called - deft & counsel present (CHIN) adjd to Jan. 14, 1974 for trial on consent.
1/16/74	Before MISHLER, CH. J. Case called Marked off

73 CR 779

DATE	PROCEEDINGS
1-15-74	Before MISHLER, CH.J. - Case called- Deft and Marion Seltzer of L.A.S. present- Suppression hearing held- Motion to suppress denied- Hearing concluded- Trial ordered and begun- Jurors selected and sworn- Govt rests Motion by the deft for a judgment of acquittal is denied- During trial deft withdraws his plea of not guilty to count 3 and after being advised his rights by the court and on his own behalf enters a plea of guilty to count 3- Sentence adjd without date- The Court declared a mistrial on count 1 and 2- Jury discharged- Trial concluded
3-29-74	Before MISHLER, CH.J. - Case called- Deft and counsel present- Motion by deft to adjd sentence is denied- Motion to withdraw plea is denied- Deft sentenced to a term of imprisonment on count 3 for a period of 15 yrs On motion of A.U.S.A. Woodfield counts 1 and 2 are dismissed-Court advise deft of his right to appeal both motions- Clerk to file a notice of appeal without fee- Bail set at \$250,000.00 Surety Co. Bond
6-29-74	Judgment and Commitment filed- certified copies to Marshal
3-29-74	Notice of appeal from orders denying motion to adjd sentence and to withdraw guilty plea filed
3-29-74	Docket entries and duplicate of notice of appeal mailed to Court of Appeals
4-2-74	2 stenographic transcripts filed, one dated Jan. 15, 1974 and one dated Mar. 29, 1974.
4-2-74	Certified copy of Judgment & Commitment ret'd and filed -deft delivered to Lewisburg, Pa.
4-17-74	Order filed & received from the Court of Appeals that the Index to Record on Appeal be docketed on or before April 19, 1974.
4-17-74	Voucher for Expert Services filed.
4-17-74	Record on appeal certified and handed to Joan Gill for delivery to court of appeals

*[Handwritten signature and initials]*



UNITED STATES OF AMERICA

INDICTMENT

- against -

SPENCER THOMAS CHIN, a/k/a "Anter Bey",  
Defendant.

Cr. No. \_\_\_\_\_  
(T. 18, U.S.C., §2113(a),  
2113(b), 2113(d) and §2)  
U.S.D. \_\_\_\_\_ N.Y.

★ AUG 23 1973 ★

THE GRAND JURY CHARGES:

COUNT I

On or about the 15th day of August 1973, within the Eastern District of New York, the defendant SPENCER THOMAS CHIN, also known as "Anter Bey", did knowingly, willfully and feloniously, by force, violence and intimidation take approximately Six Thousand and Twenty-Five Dollars (\$6,025.00), in United States currency, from the persons and presence of employees of the Manufacturers Hanover Trust Company, 1205 Fulton Street, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Manufacturers Hanover Trust Company, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(a) and §2).

COUNT TWO

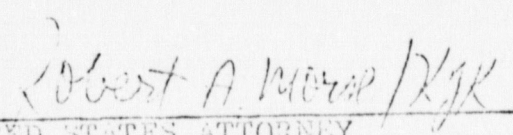
On or about the 15th day of August 1973, within the Eastern District of New York, the defendant SPENCER THOMAS CHIN, also known as "Anter Bey", with intent to steal, took and carried away approximately Six Thousand and Twenty-Five Dollars (\$6,025.00), in United States currency, from the Manufacturers Hanover Trust Company Bank, 1205 Fulton Street, Brooklyn, New York, which money was in the care, custody, control, management and possession of the said Manufacturers Hanover Trust Company, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113(b) and Section 2).

COUNT THREE

On or about the 15th day of August 1973, within the Eastern District of New York, the defendant SPENCER THOMAS CHIN, also known as "Anter Bey", did knowingly and willfully, by force, violence, and intimidation, take from the person and presence of employees of the Manufacturers Hanover Trust Company, 1205 Fulton Street, Brooklyn, New York, approximately Six Thousand and Twenty-Five Dollars (\$6,025.00), in United States currency, which money was in the care, custody, control, management and possession of the said Manufacturers Hanover Trust Company, 1205 Fulton Street, Brooklyn, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, and in commission of this act and offense the defendant SPENCER THOMAS CHIN, also known as "Anter Bey", did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present, by the use of a dangerous weapon. (Title 18, United States Code, Section 2113(d), and Section 2).

A TRUE BILL.

  
Foreman.

  
UNITED STATES ATTORNEY



